STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals

ESTATE OF DANIEL CAMERON, by
DIANE CAMERON and JAMES CAMERON,
Co-Guardians,

Docket No. 127018

Plaintiff-Appellant,

v.

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan corporation, et al.,

Defendant-Appellee.

_____/

AMICUS CURIAE BRIEF OF THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

Jill M. Wheaton (P49921)
Joseph Erhardt (P44351)
DYKEMA GOSSETT PLLC
2723 S. State St., Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

Attorneys for the Michigan Catastrophic
Claims Association

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Rules

Other

STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary set forth in Defendant-Appellee Auto Club Insurance Association's ("Auto Club" or "Defendant") Brief on Appeal is complete and correct.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. DID THE COURT OF APPEALS PROPERLY REVERSE THE CIRCUIT COURT'S ORDER GRANTING SUMMARY DISPOSITION TO PLAINTIFFS WHERE THE COURT OF APPEALS RULING THAT THE MINORITY SAVINGS PROVISION OF THE REVISED JUDICATURE ACT DOES NOT APPLY TO TOLL THE "ONE-YEAR-BACK" RULE OF THE NO-FAULT ACT:

A. IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, AND;

B. IS CONSISTENT WITH RECENT CASE LAW AND THE GOALS OF NO-FAULT LEGISLATION?

The Court of Appeals would answer:	Yes
Defendant-Appellee would answer:	Yes
Amicus Curiae the MCCA would answer:	Yes
Plaintiffs-Appellants would answer:	No
This Court should answer:	Yes

THE INTEREST OF *AMICUS CURIAE* THE MCCA

The MCCA is a statutorily created organization of all insurers engaged in writing No-Fault insurance in Michigan. The MCCA is required to reimburse member companies for the amount of personal protection ("PIP") losses they incur in excess of $375,000 per claim (i.e., "catastrophic claims") under No-Fault policies issued in the State. To fund its statutory indemnification obligations, the MCCA assesses premiums on member companies in relation to the number of No-Fault policies each member writes in Michigan. In most cases, the insurers then pass these assessments along to their Michigan policyholders.

As a result, this Court's ruling regarding whether the minority tolling provision of the Revised Judicature Act (MCL 600.5851(1)) applies to toll the "one year back rule" of the No-Fault Act (MCL 500.3145(1)) will have a substantial and wide-ranging impact on the MCCA and, through the MCCA's funding mechanism, on the insurance industry and, ultimately, every person who buys No-Fault coverage in this State. If an insurer may be required to pay for attendant care provided up to nineteen years earlier, and these costs push the total amount of the PIP benefits paid on the claim above $375,000, the MCCA must reimburse the insurer for the remainder of the claim above $375,000 that it is required to pay under No-Fault, without limitation. Because the MCCA is currently obligated to reimburse the insurer for all of the statutory benefits it must pay in excess of $375,000 for a particular claim, and Michigan requires the payment by the insurer of medical and care benefits for life, the increase in costs of attendant care translates directly into increased payments that must be reimbursed by the MCCA. Thus, the MCCA has a direct interest in this matter.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The MCCA agrees with the Statement of Facts and Proceedings set forth in Defendant's-Appellee's Brief on Appeal. The MCCA also provides the following facts regarding the creation and operation of the MCCA.

The MCCA was created by the Michigan Legislature in 1978 when it added Section 3104 to the automobile No-Fault statute.[1] MCL 500.3104. The MCCA is a private, unincorporated, non-profit association. Every insurer engaged in writing No-Fault insurance for vehicles registered in Michigan must be a member of the MCCA as a condition of its authority to write No-Fault insurance in the State. MCL 500.3104(1). The MCCA indemnifies insurers for their ultimate losses in excess of a set amount which the members sustain in PIP benefits. That amount, originally set at $250,000, increases yearly. The current level, which applies to policies issued or renewed during the period July 1, 2005 to June 30, 2006, is $375,000. MCL 500.3104(2). "Ultimate loss" is defined as "the actual loss amounts which a member is obligated to pay and that are paid or payable by the member". MCL 500.3104(25)(c). This includes medical bills, attendant care costs, and other benefits provided for under the No-Fault Act. In other words, once the insurer has paid $375,000 in benefits on a particular claim, the claim is deemed "catastrophic", and the MCCA then must reimburse the insurer for 100% of the benefits it is statutorily required to pay over and above the $375,000, including all benefits payable in the future. The MCCA is legally required to provide to its members, and the members are required to accept from the MCCA, this reimbursement. That is, members are prohibited from reinsuring these risks with private reinsurers or self-insuring against these risks.

[1] The Michigan Automobile No-Fault Insurance Act is found at MCL 500.3101 *et seq.*, and is referred to herein as the "No-Fault Act".

The MCCA was created by the Legislature in response to concerns that Michigan's No-Fault provision for unlimited, lifetime PIP benefits "placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims" and caused a risk of insolvency, particularly of smaller insurers. *In re Certified Question: Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 433 Mich 710, 714; 449 NW2d 660 (1989); *see also League General Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 340; 458 NW2d 632 (1990) ("the cost of covering an insured's catastrophic losses...could be overwhelming to an individual insurance carrier"). In addition, the MCCA was created to spread the costs of catastrophic claims throughout the automobile insurance industry and increase the statistical basis for predicting the overall costs of such claims. *In re Certified Question,* 433 Mich at 714, citing House Legislative Analysis, SB 306, March 13, 1978.

The MCCA is required to assess premiums on its members to fund its reimbursement obligations and operating expenses. MCL 500.3104(7)(d). The premium consists of two components. The first is an amount, known as the pure premium, reflecting the charge to cover the MCCA's expected losses and expenses during the assessment period. The second component is an adjustment to account for excess or deficient assessments from prior periods. *Id.* This second number is made necessary by the fact that calculating the pure premium requires the MCCA to estimate, in advance, the costs of indemnifying its members for claims it projects will be reported and incurred during the assessment period. It is therefore expected that the MCCA will adjust its actuarial assessments as claims develop over time, resulting in the modification of future cost projections for prior periods. Such adjustments lead to a recalculation, annually, of the estimated surplus or deficiency in the MCCA reserves. The statute provides for the MCCA

to make adjustments in the assessments for excess or deficient premiums from previous periods. *Id.*

The statute goes on to state that, "[p]remiums charged members by the association shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized." MCL 500.3104(22). Thus, like other expenses, MCCA assessments are reflected, in whole or in part, in the rates and premiums charged by insurers to Michigan No-Fault policyholders. As a result, any increase in the MCCA's claim costs increases the assessments charged by the MCCA to its members, which then increases the premiums charged to policyholders.

ARGUMENT

I. THE STANDARD OF REVIEW

The MCCA agrees with the standard of review set forth by Defendant-Appellee. This appeal involves a matter of statutory interpretation and the review of a grant and denial of a motion for summary disposition, both of which are reviewed by this Court *de novo*. *See, e.g., Robertson v DaimlerChrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002); *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004).

II. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE AT ISSUE.

This case involves the interpretation of the savings provision of the Revised Judicature Act ("RJA"), and whether it applies to the one-year-back rule of the No-Fault Act.[2] The savings provision states in pertinent part:

[2] The MCCA also agrees with the argument made by Auto Club that the claimants in this case are the parents, Diane and James Cameron, who provided the services for which payment is sought and who will receive the payments at issue, as opposed to Daniel Cameron, their son, for whom the care was provided. As a result, the minority tolling provision (MCL 600.5851(1)) is not applicable to this matter or to similar cases. However, for the sake of brevity, the MCCA will not repeat the Auto Club's arguments in this regard.

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. . . .

MCL 600.5851(1) (emphasis added). The one-year-back rule states in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. . . .

MCL 500.3145(1) (emphasis added).

Auto Club moved for summary disposition on the grounds that the claim for payment for attendant care benefits provided by Mr. and Mrs. Cameron in the late 1980s was barred by the one-year-back rule, as the losses were incurred more than one year before the date on which suit was commenced against Auto Club. Plaintiffs responded that the minority savings clause of the RJA applied because their son, Daniel, who was injured in an auto accident as a child, was under 18 at the time the claim for attendant care benefits accrued. The trial court agreed with Plaintiffs and entered summary judgment in their favor for the past PIP benefits sought, despite the one-year-back rule. Auto Club then appealed, and the Court of Appeals reversed, holding that the savings clause of the RJA applied only to actions brought under the RJA, and did not apply to actions brought under the No-Fault Act. This Court should affirm the Court of Appeals.

It is a fundamental rule that where the language of a statute is unambiguous, "judicial construction is neither necessary nor permitted." *Griffith v State Farm Mutual Auto Ins Co*, 472

Mich 521, 526; 697 NW2d 895 (2005); citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Here, the Court of Appeals found that the language of MCL 600.5851(1) "clearly and unambiguously states that it now applies only to actions commenced under the RJA." (Court of Appeals opinion at 3.)[3] The Court of Appeals also correctly noted that the Circuit Court's interpretation of the statute (and the interpretation urged on this Court by Plaintiffs) improperly rendered the words "an action under this act" nugatory. (Court of Appeals decision at 4, citing *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002)). *See also, Griffith*, 472 Mich at 533-34 ("we have consistently held that courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory").

The Court of Appeals decision is correct and should be affirmed. It does nothing more than apply the unambiguous language of MCL 600.5851(1), so as to give effect to the unambiguous language of MCL 500.3145(1). Both the savings provision and the one-year-back-rule are plain on their face. The savings provision clearly states that it applies to "action[s] under this act" (that is, the RJA), and the one-year-back rule clearly states that claimants "may not" recover PIP benefits "incurred more than 1 year before the date on which the action was commenced". The Legislature could not have been more clear, and the Court of Appeals decision should be affirmed.

[3] MCL 600.5851(1), as enacted in 1963, read "if the person first entitled to make an entry or bring <u>any action</u> is under 21 years of age..." (emphasis added). In 1972, it was changed to read "an action", at the same time the age was reduced from 21 to 18. In 1993, the Legislature changed the statute to state, "if the person first entitled to make an entry or <u>bring an action under this act</u> is under 18...." MCL 600.5851(1) (emphasis added). The Court of Appeals correctly noted that "changes in an act must be construed in light of preceding statutes and historical developments", Court of Appeals decision at 2, citing *MD Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447, 452; 484 NW2d 738 (1992), and rightfully determined that the change in language indicated a change in meaning.

III. THE COURT OF APPEALS DECISION IS CONSISTENT WITH RECENT CASE LAW AND THE GOALS OF THE NO-FAULT ACT

1. The Court of Appeals Decision Is Consistent With This Court's Recent Holding in *Devillers v Auto Club Ins Ass'n*.

Just days ago, this Court decided *Devillers v Auto Club Ins Ass'n*, ___ Mich ____; ____ NW2d ___ (2005) (attached as Exhibit A), in which it overruled *Lewis v DAIEE*, 426 Mich 93; 393 NW2d 167 (1986), which had applied the doctrine of judicial tolling to the one-year-back rule.[4] In so doing, this Court stated that MCL 500.3145(1) "clearly and unambiguously states that a claimant 'may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced'" and overruled *Lewis* because it "contravenes this plain statutory directive" of Section 3145(1). *Devillers* at *2.

This Court went on to state that *Lewis* impermissibly superseded "the plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit," *id.* at *33, and noted that no-fault claimants had profited from *Lewis* by receiving "a windfall in being permitted to collect benefits that the statute proclaims are nonrecoverable." *Id.* at *37. Plaintiffs in this case are seeking precisely such a windfall, not only for themselves, but for all persons who provided care to minors or otherwise incompetent persons injured in auto accidents. Under Plaintiffs' argument, such persons could collect benefits for services rendered years, if not decades, earlier, in direct contravention of the statutory language, merely because of the age or mental status of the accident victim. Such an outcome is directly contrary to the clear language of the one year back rule.

[4] Specifically, *Lewis* had adopted a rule that the one-year back limitation was tolled from the time the insured made a specific claim for benefits until the date that liability was formally denied. 426 Mich at 101.

Moreover, this Court stated in *Devillers,* "we are unable to perceive any sound policy basis for the adoption of a tolling mechanism with respect to the one-year-back rule." *Id.* at *34. Surely if this Court could perceive no "sound basis" for the adoption of a *judicial tolling mechanism* as applied to the one-year-back rule, there is no sound basis for the adoption of *the tolling mechanism set forth in the RJA, which is expressly limited to actions brought under the RJA*, to the one-year-back rule. Pursuant to *Devillers*, and its clear holding that the one-year-back rule must be strictly and literally construed, the Court of Appeals decision in this case should be affirmed.

2. The Court of Appeals Opinion Is Consistent With The Goals of the No-Fault Act and the One Year Back Rule

Most significant to the MCCA, the position advocated by Plaintiffs is entirely inconsistent with the theory behind the No-Fault legislation and, if accepted by this Court, (despite the fact that it is contrary to the plain language of both statutes at issue, and despite the ruling in *Devillers*) would result in *increased* costs to insurers and consumers --precisely the opposite of that which the Act seeks to achieve.

Plaintiffs cannot debate that one primary goal of the Michigan No-Fault system is cost containment. This Court noted in *Shavers v Attorney General*, 402 Mich 554, 581; 267 NW2d 72 (1978) that the No-Fault Act was constitutional "in its general thrust", but at the time, required mechanisms "for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates". The Court directed the Legislature to take necessary action to ensure such availability, to which the Legislature responded with the passage of MCL 500.2100, *et seq*. This Court and the Legislature clearly were, and are, concerned with keeping the costs of the mandatory No-Fault insurance down. *See also, e.g., Davey v DAIIE*, 414 Mich 1, 17; 322 NW2d 541 (1982)(while one objective of no-fault was providing an "assured, adequate

and prompt recovery for certain economic losses arising from motor vehicle accidents. . . we have also recognized a complementary legislative objective which is the containment of the premium costs of no-fault insurance"); *Tebo v Havlik*, 418 Mich 350, 367; 343 NW2d 181 (1984) ("the Legislature made a trade-off. Those who were required to participate in the no-fault scheme gave up the possibility of redundant recoveries, but they were intended to receive the benefit of lower insurance rates"); *Moore v Travelers Ins Co*, 475 F Supp 891, 895 (ED Mich, 1979) ("the aim of no-fault was to lower insurance premiums"); *Stevenson v Reese*, 239 Mich App 513, 519; 609 NW2d 195 (2000) ("a primary goal of the no-fault act is to provide an efficient, affordable system of automobile insurance").

As noted, a concomitant goal of the No-Fault structure is to keep healthcare costs down. "The no-fault act was as concerned with the rising cost of healthcare as it was with providing an efficient system of automobile insurance." *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 274; 362 NW2d 247 (1984). *See also, e.g., Gooden v Transamerica Ins Corp*, 166 Mich App 793, 800; 420 NW2d 877 (1988) ("the basic goal of the no-fault insurance system is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses *at the lowest cost to the individual and the system*") (emphasis added); *Dolson v Secretary of State*, 83 Mich App 596, 599; 269 NW2d 239 (1978) (same); *Spencer v Citizens Ins Co*, 239 Mich App 291, 300; 608 NW2d 113 (2000) (same).

As this Court noted in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Act had a "compromise rationale". The "compromise at the heart of the No-Fault Act" is that, in many cases, a driver gives up the right to a tort claim in exchange for guaranteed payment of benefits, including medical bills, regardless of his or her fault in the accident. *Id.* at 115. Likewise, accident victims compromise in that in exchange for guaranteed payments of medical

bills and attendant care costs for life, they must submit their claims in a timely manner or forfeit the right to reimbursement for past amounts incurred Indeed, the purpose of the one-year-back rule is "to encourage claimants to bring their claims to court while those claims are still fresh". *English v Home Ins Co*, 112 Mich App 468, 474; 316 NW2d 463 (1982). *See also, Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 841-42; 325 NW2d 602 (1982) ("while it is true that the one-year period of limitation is relatively short, it seems consonant with the legislative purpose in the no-fault act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably. The statute attempts to protect against stale claims and protracted litigations.").

All of these goals will be thwarted if the Court of Appeals decision is reversed. Attendant costs are an ever-increasing portion of PIP benefits paid by insurers in catastrophic cases, and for which they are reimbursed by the MCCA. A survey done by the MCCA of 500 claims for reimbursement submitted by member insurers in 2004 showed that 25.6% of the reimbursement funds paid by the MCCA were for in-home attendant care provided by family members of the accident victim. (*See* MCCA Market Basket documents, attached as Ex. B.)[5] This 25.6% is the largest of any category of reimbursement payments made by the MCCA, larger than the charges for hospital care, doctor visits, prescriptions, and equipment combined.

Moreover, this number has increased over time. (*See* Ex. B.) In 1992, 8.0 % of MCCA reimbursement dollars went for home care provided by family members. This virtually doubled

[5] Another 14.3% of the total reimbursement funds paid in these 500 claims was for in-home care provided by agencies. However, in some cases, the "agencies" are owned by the family members of the patient and as a result, some of this 14.3% consist of funds paid to family members for attendant care provided, over and above the 25.6% discussed above, but it is impossible to determine how much.

in 5 years, to 15.9% in 1997, and, as discussed above, had increased to 25.6% in 2004.[6] MCCA members believe this is due to courts' failures in the past to enforce, and allowing people such as Plaintiffs to get around, the clear one-year-back rule.

It is a virtual certainty that, should the Court of Appeals decision be reversed, the ultimate result will be an increase in MCCA assessments, and thus, an increase in the costs of auto insurance for the Michigan public As set forth above, whenever the PIP benefits payable in a case exceed $375,000, the MCCA is obligated to reimburse the insurer for all statutorily provided payments made in excess of that amount. When the amounts paid out on a claim increase, more cases meet the PIP threshold – not just new cases involving significant injuries, but also cases where the injuries occurred years ago. Should parents be allowed to go back at any point in time until the child is 19, and seek payment for years and years worth of attendant care benefits provided earlier, and the insurer be required to pay these claims regardless of their stale nature, it is a virtual certainly that these claims will reach the catastrophic level, thus taxing the MCCA with raft of catastrophic claim for which it must now provide reimbursement. This Court noted in *Devillers* that the impact of judicial tolling as provided for by *Lewis* "is increasingly producing a tax on the no-fault system as claimants are being permitted to seek recovery for losses incurred much more than one year prior to commencing suit. Thus, far from 'producing chaos', overruling *Lewis* will *prevent* potential chaos by according insurers, and the public that funds the no-fault system through payment of premiums, the certainty that the

[6] In addition, because Michigan provides for benefits for life, the MCCA expects these numbers to continue to increase, because charges for attendant care will continue to extend over the lifetime of the patient (as opposed to hospital costs and other forms of medical bills, which are usually front-loaded, incurred in the early phases of treatment following an accident, but drop off substantially as the patient stabilizes). Attendant care costs, on the other hand, continue for the life of the patient, and may actually increase over time.

Legislature intended." *Devillers* at *39. The same logic applies to the tolling sought by Plaintiffs in the instant case. A reversal of the Court of Appeals decision invites chaos.

In order to fund its reimbursement obligations, the MCCA, a nonprofit association, imposes charges on its members. As discussed above, these charges consist of two elements -- the pure premium, reflecting the charge to cover the MCCA's expected losses and expenses during the assessment period, and an adjustment to account for excess or deficient assessments from prior periods. MCL 500.3104(7)(d). To the extent attendant costs and other bills paid on a claim increase significantly, both components of the assessment charge will increase.[7] The expected losses for the assessment period will be higher, resulting in increased pure premiums, and an adjustment will likely be necessary due to deficient reserves, because the MCCA's actuarial assessments are based on a system in which payment need not be made by member insurers for losses incurred more than one year earlier. Indeed, once again, this Court honed in on this very issue in *Devillers*, noting that application of the judicial tolling doctrine to the one-year-back rule would "increase overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk." *Devillers* at *45.

The statute creating and governing the MCCA also provides that the premiums charged by the MCCA to member associations "shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized." MCL 500.3104(22). Thus, the MCCA assessments, in whole or in part, are passed along in the rates charged by insurers to their policyholders. Indeed, insurers cannot survive without being able to pass along their increased costs of doing business. Plaintiffs' argument, if accepted, will have a

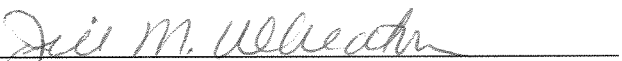
[7] Indeed, MCCA assessments have increased substantially in recent years, from $100.20 for the period July 1,2003 to June 30, 2004; to $127.24 for the period July 1, 2004 to June 30, 2005; and to $141.70 for July 1, 2005 through June 30, 2006. Should the one year back rule not be applied as written, the assessments will likely increase even more dramatically.

domino effect – it will cause increased attendant care costs, which will result in more claims being submitted to the MCCA, which will increase the assessments the MCCA is required to impose on its members, which will then increase the cost of No-Fault insurance premiums for the consumer. Such results are inconsistent with the statutory language, case law, and public policy behind the No-Fault Act and should not be countenanced.

RELIEF REQUESTED

The Michigan Catastrophic Claims Association joins the request of the Defendant-Appellee that the decision of the Court of Appeals be affirmed.

DYKEMA GOSSETT PLLC

By: 

Jill M. Wheaton (P49921)
Joseph Erhardt (P44351)
Attorneys for Defendant
Dykema Gossett PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629

Attorneys for the Michigan Catastrophic Claims Association

Dated: August 11, 2005

AA01\151517.1
ID\JMW